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## RIGHT OF FRAUDULENT VENDEE TO SHARE WITH ATTACKING CREDITORS IN PROCEEDS OF PROPERTY AS TO DEBT UNCONNECTED WITH FRAUD.

Where creditors successfully attack, as fraudulent in fact, a conveyance of property by their debtor to one who also holds a pre-existing valid debt against the debtor, an interesting question arises as to whether such fraudulent grantee, who is thus also a creditor, is entitled to a pro rata share with the attacking creditors in the proceeds of the sale of the property thus fraudulently conveyed. To state the case concretely, D. owed C. $10,000 of borrowed money. Subsequently D. became insolvent owing $50,000 and owning a farm worth $5,000. In this situation C. induced D. to sell him the farm for $5,000 cash, with a mutual fraudulent intent to hinder and delay the other creditors. Some, *but not all* of D's other creditors had this conveyance set aside and the farm sold, the fraud in fact being found, and C. having contested the matter right through to the end. C. then claimed the right to a pro rata share in the proceeds upon his $10,000 debt.

The creditors who successfully attacked the conveyance deny C.'s right as creditor to any part of the proceeds, on three grounds: 1. The statute avoids such a conveyance only as to the creditors who attack it, and C. would be entitled to any surplus existing after the attacking creditors were paid in full, but he would take it as purchaser and not as creditor, and until they are paid in full he cannot claim one cent of such proceeds.

2. Where simple contract creditors attack and set aside a fraudulent conveyance of their debtor's property, they obtain a lien from the time of the filing of the bill, answer or petition attacking same, and the priority between them (except in cases involving preference of a creditor in West Virginia), depends upon the order of such filing.

3. As grantee in the fraudulent conveyance C. is postponed as a creditor, as to the fund realized by setting it aside, to the claims of the attacking creditors. This means as to any debts he

has against the fraudulent grantor and debtor, for it would be no penalty at all to say that he is merely postponed as to the consideration he has paid, unless that were full, as in this case, which is unusual, the consideration being commonly small or entirely wanting.

Taking up these three grounds in order, let us consider them in the light, first of the Virginia and West Virginia decisions, and then, where these are lacking, the decisions of other courts so far as accessible and as comports with the necessary brevity of this article. The discussion is confined to cases of actual fraud, and it is submitted that, as we have no stare decisis rule to fetter our reasoning out a logical conclusion as to what should be the rule from elementary principles, this question ought to be thus resolved, without too servile adherence to decided cases in other jurisdictions, if such there be. In fact, so confused and contradictory are the decisions upon the law of fraudulent and voluntary conveyances, that the correct and logical application of fundamental principles is the only safe guide. As was well said by Judge Hammond of the Circuit Court for the Western District of Tennessee: "The adjudications on the subject of fraudulent conveyances are so numerous, variable, and conflicting that no court can undertake the task of deciding any case according to strict precedents. The most it can hope to do is to gather together the principles that should control its action and apply them to the case in hand, leaving each case to be governed by its own peculiar circumstances. The doctrines that govern a court of equity are not difficult to understand, and are mostly familiar to all courts—the only trouble being to properly apply them to each case." *Flash* v. *Wilkerson*, 20 Fed. Rep. 257.

**1. Limitation of Relief to Creditors Attacking Deed.**—It is beyond dispute that such a conveyance, although fraudulent in fact, is valid between the parties thereto, and only voidable as to creditors hindered, delayed, or defrauded thereby.[1]

And when such a conveyance is set aside at the instance of one

1. **Extent of invalidity.**—Tatum *v.* Tatum, 101 Va. 77, 43 S. E. 184; Spooner *v.* Hilbish, 92 Va. 333, 23 S. E. 751; Poling *v.* Williams, 55 W. Va. 69, 46 S. E. 704; Love *v.* Tinsley, 32 W. Va. 25, 9 S. E. 44; Farmers' Bank *v.* Corder, 32 W. Va. 233, 9 S. E. 220; Thornburg *v.* Bowen, 37 W. Va. 538, 16 S. E. 825; Bank *v.* Wilson, 25 W. Va. 242, 260. See, also, Shelley *v.* Nolen, 39 Tex. Civ. App. 307, 88 S. W.

or more creditors, it is set aside for the benefit of such attacking creditors alone, and not for the benefit of other creditors who did not choose to join in attacking it. As to the latter it is not set aside, and if a surplus remains after paying specific liens and the claims of the attacking creditors in full, it should go to the fraudulent vendee, as the only persons who had a right to, and did, challenge his title to it, have been satisfied in full and can no longer object.[2]

And of course it is neither necessary nor proper to seek out

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528, and other cases cited in note to Drew *v.* Myers, 17 L. R. A. N. S. 350. See, also, 6 Va.-W. Va. Enc. Dig. 622, et seq.

A conveyance, though fraudulent and void as to creditors, is nevertheless valid and binding between the parties to the fraud which brought it into existence. Core *v.* Cunningham, 27 W. Va. 206, 210, citing Murdock *v.* Wells, 9 W. Va. 552; Duncan *v.* Custard, 24 W. Va. 730. Colston *v.* Miller, 55 W. Va. 490, 506, 47 S. E. 268, likewise holds this, and that it can only be avoided at the suit of creditors.

**2. Avoided for benefit of attacking creditors alone.**—Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268, 275; Martin *v.* Warner, 34 W. Va. 185, 12 S. E. 477; Henderson *v.* Hunton, 26 Gratt. 926. See, also, Mallow *v.* Walker, 115 Ia. 238, 88 N. W. 452; Warden *v.* Browning, 12 Hun. 497; Schultze's Appeal, 1 Pa. St. 258, 44 Am. Dec. 126; Comyus *v.* Rider, 83 Hun. 471, 31 N. Y. Supp. 1042; Kaupe *v.* Bridge, 25 N. Y. Super. Ct. (2 Rob.) 459. See Moore or Fraudulent Conveyances, pp. 1020, 1021, 1038; 20 Cyc. 617, 821, 822; 14 Am. & Eng. Encyc. of Law, 350.

Bumgardner *v.* Harris, 92 Va. 188, 23 S. E. 229, is a striking application of this principle. Here certain creditors who had attacked a conveyance as fraudulent, while other creditors had only assailed it as voluntary and were barred of relief on that ground, were held entitled to have their debts paid in full out of the fund thus realized by declaring this conveyance fraudulent as to them, while the other creditors could not touch it, but it stood valid as to them.

When a debtor has conveyed away his property in fraud of his creditors, each creditor (not already having a lien thereon of course) must follow it up and recover it, acquiring a lien upon it from the time of bringing of his suit. Colston *v.* Miller, 55 W. Va. 490, 506, 47 S. E. 268.

The action of chancery upon the fraudulent grantor or assignor, is only to the extent of supplying a remedy to the suitor creditor; as to all other parties, the assignment remains as if no proceedings had been taken. McCalmont *v.* Lawrence, Fed. Cas. No. 8676, 15 Fed. Cas. 1249.

See, also, Kerr *v.* Hutchens, 46 Tex. 384, where it is held that a judgment rendered in a suit by a creditor against an executrix, and one claiming under a fraudulent conveyance from decedent, which sets aside such conveyance so far as the same may be necessary to secure the plaintiff's debt, does not affect the validity of the conveyance beyond its terms, so far as the executrix is concerned, nor as to other creditors who have not asked relief.

"The true spirit of equity in cases of this character is, we think, fully reflected by the remarks of Chancellor Walworth in Edmeston

other creditors, not holding prior liens on the specific property conveyed by the fraudulent deed, for the purpose of paying such surplus or any part thereof over to them, at least in West Virginia if not in Virginia.[3]

The grantee in a fraudulent conveyance holds the property as his own subject to the debts of the creditors against whom it may be declared fraudulent. The land should be regarded and sold as the vendee's and not as the property of the debtor.[4]

These are general principles and although many more cases might be cited for these propositions, no attempt has been made to cite more than a case or two for such well-settled points in the law of fraudulent conveyances in Virginia and West Virginia.

**2. Priority Acquired by Priority of Attack.**—It is well settled that even simple contract creditors who successfully attack a conveyance as fraudulent, acquire liens in the order that they file suits or come into existing suits by petition or otherwise. They thus secure priority in the distribution of the proceeds after payment of pre-existing liens.[5]

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*v.* Lyde, 1 Paige 637. He says: 'On further examination, it may seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination should, in the end, be obliged to divide the avails thereof with those who have slept upon their rights, or have intentionally kept back that they might profit by his exertion.' To the same effect is the language of Chancellor Kent in McDermutt *v.* Strong, 4 Johns. Ch, 691." Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 201. See, also, 20 Cyc. 824.

**3. Convention of other creditors improper.**—This is not a suit to enforce a judgment lien in which the law requires a convention of creditors. It is unnecessary when but a single creditor attacks the sale and there is no conflicting claim of priority or other cause for reference. Colston *v.* Miller, 55 W. Va. 490, 506, 47 S. E. 268; Core *v.* Cunningham, 27 W. Va. 206, 210.

There is no ground upon which the plaintiff in such a suit or the court may call upon other creditors to attack the conveyance. It is optional with them to assail it or let it stand. Colston *v.* Miller, 55 W. Va. 490, 507, 47 S. E. 268.

"In such cases, the law favors the active and diligent creditor, giving him preference over all who have not acquired judgments before the commencement of his suit, and, where there are no judgments, the creditor at large owes no duty to any other creditor of his class. Hence, he need not bring them in, nor has he any right to do so." Colston *v.* Miller, 55 W. Va. 490, 507, 47 S. E. 268.

**4. Sold as grantee's property.**—Core *v.* Cunningham, 27 W. Va. 206, 210.

**5. Priority acquired by priority of attack.**—Wallace *v.* Treakle, 27 Gratt. 479; Noyes *v.* Carter, 2 Va. Dec. 218, 23 S. E. 1; Runkle *v.*

**West Virginia Statute as to Preferences by Insolvents.** —And it is clear that in West Virginia a creditor who successfully assails a *fraudulent preference* of his insolvent debtor, *does* obtain priority over other unsecured creditors who do not *before final* decree come into the suit and *agree* to contribute to the costs and expenses thereof; *or who are not attempting to sustain preferences* under the transaction attacked.[6]

And § 2, Ch. 74, as amended 1891, does not affect § 1 of that chapter, relating to fraudulent conveyances, when the question of preference is not involved.[7]

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Runkle, 98 Va. 663, 37 S. E. 279; Davis *v.* Bonney, 89 Va. 755, 17 S. E. 229; Sweeney *v.* Grape Sugar Co., 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88; Guggenheimer *v.* Lockridge, 39 W. Va. 457, 19 S. E. 874; Witz *v.* Lockridge, 39 W. Va. 463, 19 S. E. 876; Wilson *v.* Carrico, 50 W. Va. 336, 40 S. E. 439; Gilbert *v.* Peppers (W. Va.), 64 S. E. 361; Cole *v.* Marple, 98 Ill. 58, 38 Am. Rep. 83; Tilford *v.* Burnham, 37 Ky. 109; McCalmont *v.* Lawrence, Fed. Case No. 8676, 15 Fed. Cas. 1249; Johnston *v.* Straus (C. C.), 26 Fed. Rep. 57.

"It has frequently been held that the creditor who first files his bill (to subject property fraudulently conveyed) obtains thereby a priority and is entitled to be first paid from the proceeds of the sale of the property, the fraudulent conveyance of which is set aside, if there are no valid prior liens. Clark *v.* Figgins, 31 W. Va. 156, 5 S. E. 643. A deed may be assailed as fraudulent by bill, answer or petition, and preferences thereby acquired, each creditor obtaining a lien from the time he makes his attack upon the deed. Sweeny *v.* Sugar Co., 30 W. Va. 443, 4 S. E. 431." Foley *v.* Ruley, 50 W. Va. 158, 167, 40 S. E. 382, following and reaffirming Wallace *v.* Treakle, 27 Gratt. 479. See later cases of Dent *v.* Pickens, 59 W. Va. 274, 289, 53 S. E. 154; Geiser, etc., Co. *v.* Chewning, 52 W. Va. 523, 531, 533, 44 S. E. 193; Moore *v.* Tearney, 62 W. Va. 72, 57 S. E. 263. And see 6 Va.-W. Va. Enc. Dig. 648, et seq.

**6. When preference involved.**—Wilson *v.* Carrico, 50 W. Va. 336, 340, 40 S. E. 439; Foley *v.* Ruley, 50 W. Va. 158, 167, 40 S. E. 382; Bank *v.* Prager, 50 W. Va. 660, 680, 41 S. E. 363.

**7.** Bank *v.* Prager, 50 W. Va. 660, 680, 41 S. E. 363, distinguishing and qualifying Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554 (syl. 5).

**Section 1, ch. 74,** W. Va. Code, is the statute of fraudulent conveyances. Section 2, ch. 74, relates to voluntary conveyances and transfers or charges by an insolvent debtor attempting to prefer a creditor, etc., and suits to set aside and avoid same, and declares that: "Every such suit shall be deemed to be brought on behalf of the plaintiff and all other creditors of such insolvent debtor, but the creditor instituting such suit or proceeding, together with all creditors of such insolvent debtor, who shall come into the suit, and unite with the plaintiff before final decree and agree to contribute to the costs and expenses of said suit shall be entitled to have their claims first paid in full pro rata out of the property so transferred or charged in preference to any creditor of such debtor who shall before final decree decline or fail to so unite and agree to contribute to the costs and expenses of said suit, but not in preference to such creditor as may attempt to sustain the preferences given him by such trans-

**Existing Liens Excepted.**—The priority obtained as the reward of diligence, however, does not displace or impair any prior, valid, subsisting lien.[8]

**3. Denial of Participation in Proceeds as Punishment for Fraud Persisted in.**—In a few cases we find the denial of the right to prorate with the attacking creditors based upon the idea of punishing the fraudulent transferee or beneficiary of the fraud for his participation therein, particularly where the latter

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fer or charge." Wilson *v.* Carrico, 50 W. Va. 336, 339, 40 S. E. 439.

It being contended in Bank *v.* Prager, 50 W. Va. 660, 680, 41 S. E. 363, that, by the act of 1891 amending § 2, ch. 74, Code, "the whole policy of the laws relating to 'Insolvent Debtors' was changed," it was held that the change then made related solely to transactions between debtor and creditor and was intended to prevent the preference of creditors, and was not intended to, and did not affect § 1, ch. 74, relating to fraudulent conveyances. The court thus expressed itself:

"In Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554, under the ruling of which appellant claims, if the assignment is set aside it would result in giving plaintiff an illegal preference under § 2, ch. 74, Code. The question alone of unlawful preference was there involved and syl. 5, 'The creditor who is first to assail the fraudulent conveyance of an insolvent debtor does not thereby acquire as the reward of his diligence a preference over the other creditors,' could only apply in such case as was there before the court, and cannot be construed to apply in a proceeding to set aside a gift, conveyance, assignment, etc., under § 1, ch. 74, Code, where the question of preference is not involved. Such a construction would be a repeal by this court of § 2, ch. 133, Code, which it is not competent to do, and the said syllabus, if susceptible of such construction, should be so modified as to confine it to proceedings to avoid illegal preferences. This court has not given it such broad construction as will appear from Foley *v.* Ruley, 50 W. Va. 158, and Wilson *v.* Carrico, 50 W. Va. 336, 40 S. E. 439." Bank *v.* Prager, 50 W. Va. 660, 680, 41 S. E. 363.

**8.** Zell Quano Co. *v.* Heatherley, 38 W. Va. 409, 18 S. E. 611; Hulings *v.* Hulings Lumber Co., 38 W. Va. 351, 18 S. E. 620, 631.

A creditor of the trust debtor assails the deed of trust as made with the intent to hinder, delay, and defraud him in the collection of his debt, and succeeds in his impeachment of one of the preferred claims, but the other trust creditors subsequent in order of preference successfully resist such charge as to their claims, which are held to be just and honest. Held, such assailing creditor will not, in order of payment, be promoted to the place thus made vacant, but must come next in order of payment to the successful bona fide creditors, who will hold the places given them in the deed of trust. Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611; Hulings *v.* Hulings Lumber Co., 38 W. Va. 351, 18 S. E. 631. See Hardcastel *v.* Fisher, 24 Mo. 70, and Cohn *v.* Ward, 36 W. Va. 516, 15 S. E. 140, where the qualification of the rule is discussed, and vindicated, it seems, on principle, as well as authority, although upon the question there is some conflict. Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611, 620; Hulings *v.* Hulings Lumber Co., 38 W. Va. 351, 18 S. E. 620, 631. See post, "As to Consideration Paid."

insisted upon his rights under the conveyance and opposed its setting aside.

Thus, in a suit by creditors to reduce their debts to judgment, and to set aside a fraudulent assignment, where the assignment is set aside, and a receiver of the property appointed, a preferred creditor, who claimed under the assignment and united with the trustee in defending it, is not entitled to prove his debt and prorate with the plaintiffs in the proceeds of the property.[9]

Here we have a creditor, who resisted the setting aside, of a deed of assignment preferring him, by other creditors, as fraudulent, denied any participation with the plaintiff creditors in the proceeds of the property, *although* he did not appear to have participated in the fraudulent intent. Compare it to case here considered: *this* is an assignment to a trustee preferring one creditor; *that* a sale direct; both are fraudulent in fact; both conveyances were set aside by certain creditors over the resistance of the creditor claiming thereunder. *The difference* between an assignment and a conveyance direct, in this respect *seems immaterial.* The fact that in the Wooten case it did not appear that the preferred creditor participated in the fraudulent intent, while in the present case the conveyance, though for a full price, was held fraudulent in fact, makes the latter case a stronger one, for denying the grantee any share in the proceeds, than the former, as in this case the grantee must at least have had notice of the fraudulent intent of the grantor, even if not participating therein.

While it is clear that, under § 2, ch. 74, Code of W. Va., the preferred creditor, *would* in West Virginia be entitled to claim his full pro rata after the deed was set aside, it is so only by

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9. Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466. The court said: "The second exception is to the ruling of the court declining (after the deed was found to be fraudulent) to allow Simeon Wooten to prove his debt, and prorate with the plaintiff creditors in the proceeds of the property conveyed therein. It does not appear that the said Wooten participated in the fraudulent intent of the trustor (sic), but he claimed under the deed, and united with the trustee in defending it against the just claims of the plaintiffs. He has never abandoned his adverse position, and is, even now, insisting upon a new trial upon the issue involving the validity of the said trust. Occupying this antagonistic position, he seeks to share in the fruits of the plaintiff's recovery, and the question is, shall he be permitted to do so. Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 200.

force of the statute. Wilson *v.* Carrico, 50 W. Va. 336. And as that statute is expressly held in Bank *v.* Prager, 50 W. Va. 660, 680, not to apply to a fraudulent conveyance under § 1, ch. 74, such as the present one, it would be authority for denying the fraudulent grantee any participation as creditor in the proceeds of the property in this case, unless the connection of the preferred debt with the fraudulent conveyance distinguishes the two cases, as to which quaere.[10]

But this does not seem to be the true ground, even in the cases which state it. The policy of the law is, not to punish the fraudulent grantee, but to adequately protect the rights of the attacking creditors. Such grantee is liable for only what he received from the debtor that belonged to the creditors, or the value of the interest transferred.[11]

## CONCLUSIONS.

Thus one objection and the chief one to the existence of

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**10.** "It a creditor is guilty of actual fraud in procuring a conveyance from the debtor, the claim of such creditor will, in the distribution of the assets, be postponed until the other creditors of the grantor are satisfied." 14 Am. & Eng. Enc. of Law, 350.

"But if the conveyance was made without actual fraud, or he did not participate therein, it is otherwise." 20 Cyc. 827, citing Fifield *v.* Gaston, 12 Iowa 218; Zacharie *v.* Buckman, 8 La. 305. See, also, Peoria, etc., Bank *v.* Shea, 155 Ill. 434, 40 N. E. 551; Wilson *v.* Curtis, 13 La. Ann. 601; Brown *v.* Chubb, 135 N. Y. 174, 31 N. E. 1030; Nadal *v.* Britton, 112 N. C. 188, 16 S. E. 915

**Contra.**—Where a fraudulent in fact conveyance was made to a creditor, the fact that he resisted a suit to set aside the sale did not bar him as a creditor, and disentitle him to participate as such in a distribution of the grantor's assets. Brown *v.* Morristown, etc., Stove Co. (Tenn.), 42 S. W. 161.

**11.** Zell Guano Co. *v.* Heatherley, 45 W. Va. 311, 31 S. E. 932, 934; Baldwin *v.* June, 68 Hun. 284, 22 N. Y. Supp. 852; Clements *v.* Nicholson, 6 Wall. 299, 18 L. Ed. 786.

In setting aside a fraudulent conveyance the cardinal rule of equity is to restore the creditors to what they have lost by the transaction, and their rights are satisfied when they are placed in statu quo. The court does not seek to improve their condition by imposing forfeitures and penalties for the sake of punishing the fraud. Where, therefore, the goods are immediately attached, taken from the vendee before they have been lost, damaged, or depreciated in his hands, and have been sold by the court at a small advance over the price paid by the vendee, the money being in court for distribution, the court did not, on the facts of the case, charge the vendee with any additional sum to increase the value, and allowed the fund to stand as a security to the vendee for a bona fide debt paid by the debtor out of the price given by the vendee, although thereby a preference of that debt was created, such a preference being lawful. Flash *v.* Wilkerson, 20 Fed. Rep. 257. See post, "As to Consideration Paid."

such right to prorate, when the antecedent debt is not reduced to judgment, lies in the fact that the attacking creditors have, by their successful attack, secured a lien, and therefore a priority over all claims not already prior liens on the property conveyed. Any claim of the fraudulent grantee, being of inferior dignity, must wait until they are paid in full, and then take the residue, if any, and whether as creditor or purchaser is entirely immaterial practically, although undoubtedly his rights are only those of a purchaser.

Another argument, against the right to prorate, where there are, as in this case, other unsecured creditors besides the fraudulent grantee and the attacking creditors, is drawn from comparing the position and rights of such nonattacking creditors to those of the grantee. The former concededly have no right to the proceeds of the property uncovered by the attacking creditors, for as to them it is valid. As a creditor, the grantee stands in no better position than such quiescent creditors, but rather a worse, for he has actively hindered the subjection of the property, and if he took anything as creditor, he could at most only share on equal terms with them, but in fact he is entitled to the whole surplus as purchaser. Regarded as a creditor, he is precisely in the position of such nonattacking quiescent creditors, and has no greater rights. It would be rank injustice to allow him to share in these proceeds when they are debarred therefrom.[12]

This is but another phase of the principle that the conveyance is set aside only as to the attacking creditors. See ante, "Limitation of Relief to Creditors Attacking Deed."

**As to Consideration Paid.**—Where there is actual fraud shared in by the vendee or known to him, it may be generally stated, that the vendee is not entitled to be reimbursed for what he may have paid as consideration for the conveyance, however ample the consideration may have been.[13]

The denial of any right to reimbursement for the consideration

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**12.** See Wilson *v.* Horr, 15 Ia. 489.

**13. As to consideration.**—Henderson *v.* Hunton, 26 Gratt. 926; Ruffner *v.* Wilton Coal Co., 36 W. Va. 244, 15 S. E. 48, 52; Bank *v.* Wilson, 25 W. Va. 242, 260; Tissier *v.* Wales (Ala.), 39 So. 924; Biggins *v.* Lambert, 213 Ill. 625, 73 N. E. 371, 104 Am. St. Rep. 238; Willett *v.* Froelich, 28 Ky. Law Rep. 798, 90 S. W. 572; Sabin *v.*

actually paid to the grantor in a fraudulent conveyance, or any share in the proceeds on account thereof, is for the reason that the rights of creditors would be impaired by the allowance of such payments, not to punish the grantee, and it does not apply where the consideration or any part thereof has been or can be applied to the attacking creditors' claims. As to such consideration so applied or applicable, the grantee has a valid claim.[14]

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Anderson, 31 Or. 487, 49 Pac. 870; Weiser *v.* Kling, 57 N. Y. Supp. 48; Porter *v.* Hart County, etc., Co., 29 Ky. Law Rep. 1041, 96 S. W. 832.

And he cannot claim therefor in bankruptcy. In re Lansaw, 118 Fed. Rep. 365.

**14. Exception.**—Baldwin *v.* June, 68 Hun. 284, 22 N. Y. Supp. 852, approved in Zell Guano Co. *v.* Heatherly, 45 W. Va. 311, 31 S. E. 932, 934; Clements *v.* Nicholson, 6 Wall. 299, 18 L. Ed. 786; Voorhees *v.* Blanton, 83 Fed. 234; Bogard *v.* Buckner, 5 Ky. Law Rep. 856; Diamond Coal Co. *v.* Carter Dry Goods Co., 20 Ky. Law Rep. 1444, 49 S. W. 438.

"In Baldwin *v.* June, 68 Hun. 284 (Syl.), 22 N. Y. Supp. 852, it is held that 'when a conveyance by a judgment debtor is set aside as in fraud of creditors, in an action in the nature of a creditors' bill, it should be retained as security to the grantee (although said grantee is affected with knowledge of the fraudulent intent with which it was executed) for so much of the consideration therefor as is represented by land conveyed to the grantor in exchange therefor, which, by reason of such conveyance to the judgment debtor, is made subject to, and the proceeds of which are applicable in satisfaction of, plaintiffs' judgment. Such security, however, is not to be extended to an antecedent indebtedness of the grantor to the grantee included in the consideration for the conveyance.' In this opinion, the judge who rendered it says: 'I am aware that it has been frequently held that payments made by a fraudulent vendee upon the purchase of property cannot be recovered back or be allowed to him in a judgment setting aside a conveyance which was fraudulent; that he, being a guilty participant in the fraud, was entitled to no relief from the court. But these decisions are founded upon the theory that the rights of the creditors would be impaired by the allowance of such payments. * * * The refusal to reimburse for moneys paid in such a case is not for the purpose of punishing a party because of his wrongdoing, but is for the purpose of preserving the rights of the creditors to the extent that they would have been, had the conveyance not been made.' In Bank *v.* Halsted, 134 N. Y. 520 (Syl.), 31 N. E. 900: 'Where a transfer of personal property is set aside as fraudulent as against the creditors of the transferrer, in an action brought by them, and it appears that prior to the transfer the property was pledged to secure a valid debt to a party in no wise connected with the fraud, and that the fraudulent transferee simply received the surplus of the avails of the sale of the property after deducting the amount of the debt, the creditors are not entitled to recover of him the full value of the property, but simply the value of the interest transferred, i. e., the value of the property, deducting the amount of the debt. However scandalous the fraud may be, a court of equity has no power to award judgment for a sum exceeding that value in order to punish the party for his

Otherwise the deed cannot stand as security for payments made thereunder by the grantee,[15] or for subsequent advances to the grantor.[16]

But it has been held that a fraudulent deed may be decreed to be a mortgage to secure actual payment made by grantee to take up a mortgage on the property and to pay a bona fide debt of the grantor.[17]

It seems that where the fraudulent grantee had a valid pre-existing lien for a prior debt, although he surrendered it when he took the fraudulent conveyance, yet, when the deed is set aside, he is remitted to his former position of lienor, and can claim his rights thereunder.[18]

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wrongdoing.'" Zell Guano Co. *v.* Heatherly, 45 W. Va. 311, 31 S. E. 932, 934.

Thus, where it was insisted that not only the property fraudulently conveyed should be restored to the pursuing creditors, as had been done, and the proceeds all applied to their debts, and the grantee adjudged to pay the costs of their proceeding to set aside the trust deed, but that the money loaned by him to the grantor, and secured by the trust deed, should be forfeited to their benefit, thus not only having the benefit of all the property they were ever entitled to, to satisfy their debts as far as it would, but having their security increased by this sum of $6,025, which came to the possession of grantor without consideration, which he never converted to his own use, and which never entered into or became a part of his estate, this was denied and the bill therefor dismissed. Zell Guano Co. *v.* Heatherly, 45 W. Va. 311, 31 S. E. 932, 934. See ante, "Denial of Participation in Proceeds as Punishment for Fraud Persisted in," 3.

**15. As security for payments.**—Henderson *v.* Hunton, 26 Gratt. 926; Hazlewood *v.* Forrer, 94 Va. 703, 27 S. E. 507; Timms *v.* Timms, 54 W. Va. 414, 46 S. E. 141; Webb *v.* Ingham, 29 W. Va. 389, 1 S. E. 816; Burt *v.* Gotzian & Co., 102 Fed. 937, 43 C. C. A. 59; Brown *v.* Morristown, etc., Co. (Tenn.), 42 S. W. 161. See post, "Preference or Security."

**16. Subsequent advances.**—Head *v.* Harding, 166 Ill. 353, 46 N. E. 890.

**17. Application to existing lien.**—Jas. M. Smith Co. *v.* O'Brien, 57 N. J. Eq. 365, 41 Atl. 492; Ackerman *v.* Merle, 137 Cal. 169, 69 Pac. 983. See contra, Daisy Roller Mills *v.* Ward, 6 N. D. 317, 70 N. W. 271; Morley Bros. *v.* Stringer, 133 Mich. 690, 95 N. W. 978; Weiser *v.* Kling, 57 N. Y. Supp. 48.

Or, in West Virginia, where the grantee has paid a vendor's lien on the property as part of the consideration for the conveyance. Kemble *v.* Wotring, 48 W. Va. 412, 37 S. E. 606. See, also, Schmertz *v.* Hammond, 47 W. Va. 527, 35 S. E. 945.

**18. Same.**—If a note secured by a valid pre-existing mortgage is given up to the mortgagor upon the execution by him to the mortgagee of a fraudulent conveyance of the premises, the amount of the note being included in the debt intended to be secured by the fraudulent conveyance, the original mortgage is not thereby extinguished or discharged. If such fraudulent conveyance is avoided by the

As to whether the vendee is entitled to reimbursement of legitimate expenses incurred in the preservation and care of the property while in his possession or control, the cases are much in conflict, although many of the best considered ones hold that he can so claim reimbursement.[19]

**Antecedent Indebtedness as Part of Consideration.**—Where the antecedent indebtedness is included in the consideration for the conveyance thus set aside, there is abundance of authority for denying participation in the proceeds as to it.[21]

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creditors of the mortgagor, the mortgagee is remitted to his previously existing legal rights under the mortgage. The purchaser is permitted to hold nothing by his fraudulent contract, and the creditors take all their debtor fraudulently conveyed, and nothing more. Ladd *v.* Wiggin, 69 Am. Dec. 551.

Where one holding mortgages based on loans made to take up prior mortgages on the property thereafter receives a conveyance of the property, which is held invalid, as in fraud of a creditor subsequently acquiring a judgment, the judgment is subject to the liens of the mortgages for the amount due thereon. Burne *v.* Partridge, 48 Atl. Rep. 770, 61 N. J. Eq. 16 Dick. 434, citing 2 Bigelow, Fraud, p. 416, § 5; Malloney *v.* Horan, 49 N. Y. 111, 121; Roberts *v.* Jackson, 1 Wend. 478, 484.

**19. Reimbursement of expenditures.**—Lamb *v.* McIntyre, 183 Mass. 367, 67 N. E. 320; Langertee's Bank *v.* Mack, 54 N. Y. Supp. 950; Boshart *v.* Easton, 74 N. Y. Supp. 1121; Kickbusch *v.* Coswith, 108 Wis. 634, 85 N. W. 148; Loos *v.* Wilkinson, 113 N. Y. 485, 21 N. E. 392, 4 L. R. A. 353. See contra, Railroad Co. *v.* Soutter, 13 Wall. 517.

**21. Antecedent indebtedness included.**—Baldwin *v.* June, 68 Hun. 284, 22 N. Y. Supp. 852, quoted approvingly in Zell Guano Co. *v.* Heatherly, 45 W. Va. 311, 31 S. E. 932; Smith *v.* Craft, 12 Fed. Rep. 856, 863; Kanawha Val. Bank *v.* Wilson, 25 W. Va. 242; Livingston *v.* Swafford Bros., etc., Co., 12 Colo. App. 331, 56 Pac. 355; Graves *v.* Steel, 117 Ia. 701, 89 N. W. 1107. See contra, Wright *v.* Craig, 40 Or. 191, 66 Pac. 807.

If a deed be set aside as fraudulent and void as to creditors of the grantor, because the same was made with intent to hinder, delay and defraud such creditors, and a part of the consideration of such deed was the satisfaction of a bona fide debt due from the grantor to the grantee, such fraudulent grantee is not entitled to charge the lands thereby attempted to be conveyed with the amount of such bona fide debt. Kanawha Val. Bank *v.* Wilson, 25 W. Va. 242.

Where it is fairly established that a conveyance was executed with intent to defraud the grantor's creditors, it will not be allowed to stand as security for a bona fide indebtedness of the grantor to the grantee. The court said, quoting from Baldwin *v.* Short, 125 N. Y. 553, 26 N. E. 928. "A different rule would put a premium upon fraud. Almost invariably some honest consideration is made the agency for floating a scheme of fraud against creditors, and, if that may always be saved, nothing is lost by the effort, and the temptation to venture it is increased." Woods *v.* Van Brunt, 39 N. Y. Suppl. 396.

In Sommermeyer *v.* Schwartz, 89 Wis. 66, 61 N. W. 311, the debtor's

Does the fact that the bona fide antecedent debt was made a part of the consideration for the sale, being otherwise unconnected therewith, differentiate these cases from the principal case, where the fraudulent conveyance did not refer to it all? If not, the cases seem analogous, and it does not seem that the difference is material. In Rosenheim *v.* Flanders, the attacking creditors had an attachment lien, but the court seems to lay no stress on that, and the lien acquired by the attacking creditors on filing their bill would seem at least its equivalent.

**Preference or Security.**—Or where the conveyance is to secure or give a preference to the antecedent indebtedness.[22]

**Applications and Deductions.**—Applying these principles

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wife claimed under an attachment prior to an attachment of the attacking creditor, and under a conveyance also prior thereto. Both were held invalid for fraud, and she was postponed even as to a bona fide pre-existing debt she held, on the ground that she had involved it with a claim which was fraudulent, and the good and bad could not be separated. The fraud corrupts and destroys the whole. Citing Fairfield *v.* Baldwin, 12 Pick. 388.

In Rosenheim *v.* Flanders, 114 Iowa 291, 86 N. W. 293, a bill of sale by an insolvent debtor A. to B. for a consideration in part cash and in part notes and cancellation of an antecedent debt, was held void at the instance of attaching creditors, as fraudulent and as taken by grantee for the purpose of aiding in the fraud. It was held that B., although a creditor, having unnecessarily assumed the character of a purchaser, must be treated as a purchaser merely, and, having participated in the fraud, was not entitled to protection, even to the amount of the indebtedness due him, but the proceeds must be paid to the plaintiff creditors to the full extent of their claims with interest. Citing Wilson *v.* Horr, 15 Iowa 489; Chapman *v.* Ransom, 44 Iowa 377.

**22. Preference or security.**—Where a creditor has endeavored to obtain a fraudulent preference over the other creditors of an insolvent debtor, by having procured a conveyance to himself of all the debtor's property, and the other creditors have obtained a decree setting it aside as null and void, his claims should be postponed till the other creditors are satisfied. White *v.* Graves, 7 J. J. March. (Ky.) 523, as stated in 14 Am. & Eng. Enc. of Law, 350. See Wilson *v.* Horr, 115 Ia. 489.

"When a sale is not tainted with actual fraud, but is fraudulent merely by construction of law, it is sometimes allowed to stand as a security for the grantee or vendee. Tripp *v.* Vincent, 8 Paige 176; Weeden *v.* Hawes, 10 Conn. 50; Bump, Fraud. Cont. 597. But when a fraudulent scheme or purchase, by which a creditor gets the property of an insolvent debtor, is set aside in a suit brought by another creditor against the fraudulent grantee or vendee, he will not be allowed to share with the plaintiff the proceeds of the property. Wilson *v.* Horr, 15 Iowa 489; Riggs *v.* Murray, 2 Johns. Ch. 565; Harris *v.* Sumner, 2 Pick. 129." Here a bill of sale in trust for a creditor was held fraudulent, and other creditors were given a decree against the preferred creditor for the full amount of their debts, they being

to the present case, C. stands, as to the fund realized by setting aside the conveyances to him, in the position of a creditor who did not attack the conveyance, except that, if there were any surplus after paying in full the attacking creditors, it would go to him as grantee, *not as* creditor, and he is entitled to receive

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less than what was realized by a sale of the property by the vendee. That is, the fraudulent vendee took only the surplus, if any. Smith *v.* Craft, 12 Fed. Rep. 856, 863.

In Hardcastle *v.* Fisher, 24 Mo. 75, Leonard, J., says: "The better way to render them (deeds of assignments) effectual in securing the effects of insolvent debtors to their creditors will be to exclude the fraudulent claimant from any participation in the fund, and letting it stand in favor of the honest parties." The analogy between deeds of assignment and deeds of trust to secure creditors is sufficiently close to make these cases direct authority for holding this deed valid as to the honest creditors secured, and void as to those whose debts are fictitious and fraudulent in whole or in part. Woodson *v.* Carson, 135 Mo. 521, 35 S. W. 1005, 1006.

And a mortgage which is void as in fraud of creditors, because founded in part upon a pretended debt, will not be sustained to the extent of the honest debt as against creditors, though their claims may have been created since the filing of the mortgage, and with knowledge of its existence. Levy *v.* Hamilton, 74 N. Y. Suppl. 159.

Although a mortgagee may have an honest claim, he cannot, as against a pursuing creditor, retain property obtained by him under his mortgage if it be fraudulent; and if he takes and sells the property by virtue of his mortgage before any lien thereon is acquired by a creditor, the latter may compel him to refund the proceeds; for the mortgage being void, all proceedings under it are also void. The right of the creditor cannot be defeated by a fraudulent mortgagee by merely selling the mortgaged property. Mandeville *v.* Avery, 21 Am. St. Rep. 678.

See, also, U. S. Rubber Co. *v.* Am. Oak Leather Co., 181 U. S. 434, 45 L. Ed. 938; White *v.* Cotzhausen, 129 U. S. 329, 32 L. Ed. 677; Means *v.* Dowd, 128 U. S. 273, 32 L. Ed. 429; Demsey *v.* Kleinsmith, 11 Wall. 610, 615, 20 L. Ed. 223; Streeter *v.* Jefferson County Bank, 147 U. S. 36, 37 L. Ed. 68, all holding that, in the absence of actual fraud, an attempt to secure an illegal preference will not cause the creditor to be postponed as to his just debt, but he will still share pro rata.

But it is strongly intimated by the court here, that if fraud in fact had been shown, instead of mere constructive fraud, the right to so participate would have been denied. U. S. Rubber Co. *v.* Am. Oak Leather Co., 181 U. S. 434, 448, et seq., 45 L. Ed. 938.

**Contra.**—Where notice is given of the pendency and object of a suit to set aside a conveyance, claimed to have been made to defraud creditors, or to declare an assignment, giving preferences, a trust for the benefit of all the creditors of the assignor, and judgment is rendered against the defendant, he is not precluded by such notice from participating as a creditor (if one) in the distribution of the fund, though other creditors came in and complied with the provisions of the statute (§ 6344, Rev. St.) giving to such creditors, with the plaintiff, a priority in its distribution. Pendery *v.* Allen, 53 Ohio St. 251, 41 N. E. 255. And see statutory rule in W. Va., ante, "Priority Acquired by Priority of Attack," 2.

nothing out of the proceeds as long as the attacking creditors are not satisfied in full.[23]

Supposing there were a surplus of proceeds, the grantee would take it as purchaser, and not have to credit same on his debt, leaving his claim as creditor undiminished.[24]

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**23.** Lee *v.* Hollister (D. C.), 5 Fed. 752; Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303; Allen *v.* Trustees, 102 Mass. 262; Wood *v.* Hunt, 38 Barb. 302; Welch *v.* Tobias, 7 N. Y. St. Rep. 296; Williams *v.* Avent, 40 N. C. 47; Porter *v.* Hart County, etc., Co., 29 Ky. Law Rep. 1041, 96 S. W. 832, 14 Am. & Eng. Ency. of Law, 350; 20 Cyc. 617.

**24.** In Wilson *v.* Horr, 15 Iowa 489, a chattel mortgage was held to have been made by a debtor, insolvent or contemplating insolvency, with the intention "to thus place the property in the hands of T., to be held by him, not to secure any debt, but out of reach of attachments or executions in favor of other creditors." It was held void as to attacking creditors because of such intention to defraud, shared in by grantee. It was held that T., to whom the grantor was indebted in some amount, could not "claim equitably to come in and share with these other creditors in the proportion that his real debt bears to the whole property included in the fraudulent transfer." The court went on to say: "To such a claim, it seems to us there are insuperable difficulties. In the first place, it may be suggested that he never has reduced his demand to judgment, nor in any manner placed himself in a position to claim the reward which equity, as well as law, awards to the diligent. Nor does the doctrine that 'Equality is Equity,' have any application. If it does, it must be upon the principle that as T. had the property in his possession, and is not himself asking any affirmative relief, he may, so to speak, set off the amount of his claim against the proceeds of the property placed in his hands by the fraudulent mortgagors or grantors. But the effect of this would be, indirectly, if not directly, to give him all the benefit of a transaction, fraudulent in fact, which he would derive from one ever so honest. And here let it be remembered, that the mortgage is found to be void for fraud in fact. Under such circumstances, we are not aware that it has ever been held that the fraudulent creditor is entitled to come in pari passu with other bona fide creditors for a distributive share out of the property which is the subject of the fraud. If so, he might not receive a premium for his violation of an express penal statute, he would at least be recognized as having as clean hands, and entitled to the same protection, as the most honest creditor, and that too in a court which, while it may not punish such violators of law, certainly will not disregard what is due to the diligent, whose consciences are untainted with fraud. The case of Riggs *v.* Murray (2 John. Ch., 565; S. C., 15 John., 571), differs from this in the important particular that there the allegation of actual fraud was 'entirely destitute of foundation;' the case 'was stripped of all imputation of actual fraud;' the fraud, if any, arose as matter of law, intrinsically from the deeds themselves. Being thus conclusively fraudulent, they were voidable only, and could be confirmed. But, says Thompson, Ch. J. (15 John., 585), 'a deed founded in actual and positive fraud, as being made under the influence of corrupt motives, and with intention to cheat creditors, may be considered void ab initio. The grantee in the deed may be considered particeps criminis, and is not permitted to deduce any right from an act founded in actual fraud.' And we may remark, that

The true principle seems to be that where the fraudulent grantee had a valid prior lien, he is entitled to his rights thereunder, notwithstanding the fraud, as the law does not seek to punish him. But if he had no such lien, the only ground on which he could claim to share with the attacking creditors as a creditor for an antecedent simple debt, although unconnected with the fraud, would be under some sort of lien arising from his possession or legal title under the deed. But this is out of the question, as no rights can be derived from that fraudulent and avoided transaction. Consequently, having no lien, he must be postponed until the liens of the attacking creditors are satisfied in full.[25]

Even if other creditors set up their debts by petition in such a suit as this, their claims can only come in for what is left after the creditors, who first attacked, have been paid in full, so that even if C. had any rights as a creditor to the proceeds, they are subsequent and he could not claim on equal terms.

The consideration of the rule where the assets are being administered in a bankruptcy proceeding, or other proceeding where the law devolves upon a court the duty of taking a fund into its custody and distributing it according to the respective interests of the parties, has been deferred for another article. So far we

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as he can claim no right from his fraudulent act, he stands certainly in no better position than any other creditor having a simple debt against the fraudulent vendors, and it will not be pretended that such creditors could come in for a ratable proportion of the property."

It is said in 30 Cyc. 638, that "where the conveyance is founded in actual fraud, * * * the conveyance will not, as a general rule, be allowed to stand as security either for a bona fide indebtedness of the grantor to the grantee." Citing Hall *v.* Heydon, 41 Ala. 242; Price *v.* Masterson, 35 Ala. 483; Rosenheim *v.* Flanders, 114 Iowa 291, 86 N. W. 293; Bailey *v.* Ross, 20 N. H. 302; Mandeville *v.* Averry, 124 N. Y. 376, 26 L. Ed. 951, 21 Am. St. Rep. 678; Woods *v.* Vanbrunt, 6 N. Y. App. Div. 220, 30 N. Y. Suppl. 896; Baldwin *v.* June, 68 Hun. 384, 22 N. Y. Suppl. 852.

"If the grantee, being also a creditor, participated in the fraudulent intent with which the transfer was made, his rights will be postponed to those of other creditors." 20 Cyc. 826-7, citing Baldwin *v.* June, 68 Hun. (N. Y.) 284, 22 N. Y. Suppl. 852; Nusbaum's Appeal, 1 Pa. Cas. 109, 1 Atl. 392. (In both these cases the attacking creditors were judgment creditors.)

**25.** See Wilson *v.* Horr, 15 Ia. 489. It is said in Baldwin *v.* June, 22 N. Y. Suppl. 852, that the grantee defendant in a conveyance attacked for fraud, does not "come into court," but is brought in as a defendant (p. 855), and very unwillingly.

have only considered "judgment creditors' bills" as distinguished from "general creditors' bills."[26]

JAMES F. MINOR,
*October, 1909.* Charlottesville, Va.

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**26.** See Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199; Means *v.* Dowd, 128 U. S. 273, 32 L. Ed. 429; Nadal *v.* Britton, 112 N. C. 188, 16 S. E. 915.

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